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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 17/2018 concerning Ronnen Herscovici (Romania)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 20 December 2017 the Working Group transmitted to the Government of Romania a communication concerning Ronnen Herscovici. The Government submitted a late response on 21 March 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Ronnen Herscovici, born in 1994, is a Romanian citizen. He usually resides in Voluntari, near Bucharest. At the time of the submission by the source, Mr. Herscovici was being held in pretrial detention at Rahova prison in Bucharest.

Arrest and detention

5. According to the source, Mr. Herscovici was arrested on 11 March 2017. He was returning home by car from a night out with his girlfriend when he was reportedly stopped in traffic by a police patrol on suspicion that he had contravened a red light. One of the police officers asked him to get out of the car. Mr. Herscovici was reportedly very scared by the aggressive behaviour of the police officer and refused to leave his car. After his refusal, the officer grabbed him by the collar and neck and started to pull him out of the car. At that point, Mr. Herscovici became very frightened and, as a result of the pressure of the situation, he turned on the engine of the car and started to drive forward, making a left turn and coming to a halt after a few metres.

6. The source reports that the police officer subsequently accused Mr. Herscovici of attempted murder, referring to the fact that, when he started to drive the car, the officer remained attached to the car and was pulled along by it. According to the source, the police officer was later seen by a doctor who found that he had fractured a finger. The doctor prescribed algocalmin and recommended that the officer put ice on his finger.

7. According to the source, Mr. Herscovici stopped the car after a few metres, and 38 armed police officers subsequently gathered around the car. Mr. Herscovici then locked himself in the car and refused to get out of the vehicle. The police officers reportedly pulled a gun on him and then fired it into one of the wheels of the car. They also sprayed tear gas into the car, even though Mr. Herscovici reportedly did not show any signs of violence and was the only person in the car. In addition, at that time, his parents arrived at the scene and tried to explain to the police that Mr. Herscovici was suffering from depression and was in need of special care, especially in situations in which he became highly stressed. Instead of calming down and seeking specialist advice — Mr. Herscovici was already in a state of shock — the police reportedly continued to be aggressive and used tear gas and threatened him with a gun. Mr. Herscovici was subsequently arrested and detained.

8. The source reports that Mr. Herscovici was detained on the basis of articles 202 (1), (3) and (4) (e), 223 (2) and 226 (1) and (2) of the Code of Criminal Procedure. He was accused of committing a serious crime, namely attempted murder.

9. The detention of Mr. Herscovici was most recently extended on 26 September 2017, which is the date on which the judge's decision in case No. 32916/3/2017/a1.2 in the Preliminary Court of Bucharest Tribunal was pronounced. The prosecutor argued that it was necessary to extend the detention of Mr. Herscovici due to the fact that he had allegedly committed a serious crime (attempted murder), aggressed a police officer and caused a disturbance of the peace.

10. In his defence, the legal representative of Mr. Herscovici submitted that none of those grounds for extending pretrial detention were justified, and requested that the motion be rejected. With reference to article 202 of the Code of Criminal Procedure, the legal representative suggested that another preventive non-custodial measure, notably house arrest, would be a sufficiently firm measure to ensure the purpose of the article, but at the same time a measure that would ensure that Mr. Herscovici could receive the medical treatment he required.

11. The legal representative noted that, according to the law, a request to extend the detention would need to be further substantiated and not merely copy the arguments that had been made previously in relation to pretrial detention or its extension. For detention to be extended, there would have to be a justification for such a decision and a reason why another measure would not be sufficient.

12. However, according to the source, the prosecutor did not present any new reasons; he referred only to the gravity of the allegations against Mr. Herscovici. The source underlines that the prosecutor did not provide any new circumstances in order to justify an extension of the pretrial detention.

13. The legal representative of Mr. Herscovici noted that, from the viewpoint of articles 202, 234 and 237 of the Code of Criminal Procedure, the seriousness of the accusation and the fact that a judge had previously agreed to Mr. Herscovici's detention would not be sufficient to extend the pretrial detention.

14. The source indicates that, according to the legal representative, the prosecutor's version of the facts surrounding the event was incorrect, including the claim that Mr. Herscovici had had the clear intention of escaping from the scene. The legal representative also referred to the unacceptable behaviour of the police force, putting forward that Mr. Herscovici had had no intention of harming the police officer. The fact that the officer had subsequently clung to the car and walked a few yards next to it did not justify pressing such a serious charge.

15. The source also reports that the legal representative asked the judge to consider whether the reference to the gravity of the charge was credible, given that the police officer only suffered a relatively minor injury, namely a fractured finger. In addition, according to medical records, the doctor had recommended that the police officer should apply ice on the finger and take algocalmin. The source thus states that the legal classification of attempted murder is unreasonable in this case.

16. The legal representative also called for consideration to be given to the fact that, in all procedural acts, the prosecutor had mentioned the sequence of events, in the sense that Mr. Herscovici had turned on the engine and started the car, after which the police officer hung on to it. The legal representative thus submitted that that showed that there was no intention on the part of Mr. Herscovici to use the car to run the injured party over.

17. At the same time, the legal representative reportedly asked for the undisclosed video footage to be considered, in which the police officer did not appear to have fallen on the road. In addition, other testimonies reportedly indicate that the officer had walked a few metres next to the car, before it speeded up.

18. According to the source, the legal representative reportedly proved that Mr. Herscovici had had a panic attack, which was the reason for his refusal to get out of the car, and that he showed no violence towards the police officer.

19. In addition, the legal representative reportedly asked that the serious medical condition of Mr. Herscovici be considered. The case file included medical records released by Obregia Hospital, showing that Mr. Herscovici had been undergoing treatment, including medication, for depression. Although he was not prevented from driving and did not represent a danger to others, his reaction vis-à-vis the police officer who attempted to remove him from his car was different from that of a person who was not undergoing such treatment.

20. The source refers to recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe,[1] in which it defines the applicable rules against abuse of preventive measures, including remand in custody. According to the source, rules 6 and 7 imply that a preventive measure cannot be extended if another preventive measure can ensure the purpose of article 202 of the Code of Criminal Procedure.

21. The source also refers to articles 3 and 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the former of which prohibits inhuman treatment. According to the source, this prohibition would extend to the detention of a person with an illness, including pre-emptive arrest or the execution of a sentence.

[1] Recommendation Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

22. According to the source, house arrest would ensure a balance between the guarantees specific to the preventive measures, as defined in article 202 of the Code of Criminal Procedure. Moreover, this would allow Mr. Herscovici to have his family close by and the support of his current doctor and psychiatrist, and be able to treat his medical condition.

23. The legal representative had reportedly requested that the court take into consideration the fact that Mr. Herscovici had attempted suicide twice and, in the event that pretrial detention were maintained, he would not be able to receive psychological treatment and specialized support. According to the source, legislation in Romania does not allow for a psychiatrist from outside a prison to treat a detainee.

24. According to the source, the legal representative also asked that, beyond the abstract considerations that he had spoken of in respect of the law, there was the life of a real person, Mr. Herscovici. Even if he might have been wrong in the way he responded to the police, the court must strike a balance between what the prosecution and the defence request and the interests of society and of the individual, and judge by objective criteria, in accordance with rule 8 of recommendation Rec(2006)13.

25. The source submits that other precautionary measures would be sufficient given the current state of the investigation in the case of Mr. Herscovici.

26. The source also submits that the detention of Mr. Herscovici is arbitrary because the facts do not justify a charge of attempted murder.

27. In this respect, the source notes that the Romanian Constitution allows for arrest under the conditions stipulated by law. Article 23 of the Constitution states that individual freedom and security of person are inviolable; that search, detainment or arrest of a person are only permitted in cases, and under procedures, provided for in law; and that deprivation of freedom can only be based on criminal grounds. The source also notes that, in order for an arrest to be possible in accordance with the law, article 202 of the Code of Criminal Procedure requires that there is a clear argument that a serious crime has been committed. The source reiterates that the events of the night of 10 and 11 March 2017 and the injury that the police officer sustained are not sufficiently serious to justify a charge of attempted murder. Contravening a red light in a car cannot be the basis for an arrest lasting more than three months. The source adds that not even that charge has been proven in the case file.

28. The source therefore asserts that Mr. Herscovici is now in a situation of abusive and unjustified pretrial detention for an offence that should have been punished by a small fine or a disciplinary measure. The source notes that the legal rights of Mr. Herscovici have been violated and that Romania does not have an efficient system of appeal and control regarding the legality of a preventive measure.

Response from the Government

29. On 20 December 2017, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested that the Government provide, by 19 February 2018, detailed information about the current situation of Mr. Herscovici and any comments on the source's allegations.

30. On 19 February 2018, the Government of Romania sought an extension of the deadline to submit its response on the basis of paragraph 15 of the methods of work of the Working Group. In conformity with paragraph 16 of its methods of work, the Working Group granted an extension of two weeks to the Government to submit its response by 5 March 2018. However, the Government only submitted its reply on 21 March 2018. The reply was thus 15 days late, and therefore the Working Group cannot accept it.

31. On 21 March 2018, the late reply of the Government was transmitted to the source for further comments. The Working Group appreciates receiving such further comments on 28 March 2018.

Further information received by the Working Group

32. On 21 March 2018, the Working Group was informed that, on 20 December 2017, the Court of Appeal of Bucharest decided to replace the pretrial detention of Mr. Herscovici with house arrest.

Discussion

33. In the absence of a timely response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

34. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

35. The Working Group observes that the present case raises the issue of the appropriateness of the pretrial detention imposed upon Mr. Herscovici by the Romanian authorities following the reported incident with the police on 11 March 2017, which lasted until the replacement of pretrial detention with house arrest on 20 December 2017.

36. It is a well-established norm of international law that pretrial detention should be the exception and not the rule, and that it should be ordered for as short a time as possible[2] in order to comply with article 9 of the Covenant.

37. The Working Group wishes to refer to the Human Rights Committee's general comment No. 35 (2014) on liberty and security of person, according to which it should not be the general practice to subject defendants to pretrial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as "public security". Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.

38. In the present case, the Working Group notes that the replacement of pretrial detention with house arrest suggests that an individual determination of Mr. Herscovici's circumstances, including his need for medical treatment, may have taken place. However, the Working Group has no further details of the nature of this decision to place Mr. Herscovici under house arrest, how it was reached and the process that led to it. Accordingly, the Working Group is unable to state with certainty that the Government did not meet its obligation to provide Mr. Herscovici with an individualized determination, and therefore does not have sufficient information to conclude whether his detention was arbitrary.

Disposition

39. In the light of the foregoing, the Working Group renders the following opinion:

Based on the information obtained to date, the Working Group is not in a position to conclude that the detention of Ronnen Herscovici falls within any of the categories

[2] See opinions No. 28/2014, No. 49/2014 and No. 57/2014; and A/HRC/19/57, paras. 48–58. See also A/HRC/30/19; *Kovsh v. Belarus* (CCPR/C/107/D/1787/2008); CAT/C/TGO/CO/2, para. 12; A/HRC/25/60/Add.1, para. 84; E/CN.4/2004/56, para. 49; A/HRC/19/57, para. 48; and CCPR/C/TUR/CO/1, para. 17.

of arbitrary deprivation of liberty applied by the Working Group. In accordance with paragraph 17 (c) of its methods of work, the Working Group decides to keep the case pending without prejudice to the ability of the source and the Government to provide further information that would allow the Working Group to determine whether Mr. Herscovici had been detained arbitrarily.

[*Adopted on 20 April 2018*]